Office Supreme Court, U.S.
FILED
DEC 23 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 699

SHAFFIQ KASSAB,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MURRAY M. CHOTINER,
PATRICK J. HILLINGS,
202 South Hamilton Drive,
Beverly Hills, California,
Counsel for Petitioner.

SUBJECT INDEX

	Page
Citation to opinion below	1
Jurisdiction	1
Questions presented	2
The statutes and regulations involved	2
Statement	3
Reasons for granting the writ	5
Conclusion	7

INDEX TO APPENDICES

Appendix A. Statutes and regulations involved	1
Appendix B. Opinion	2
Appendix C. Judgment	8

TABLE OF AUTHORITIES CITED

Cases

	Page
Blagaic v. Flagg, 304 F. 2d 623	5, 6
Foti v. Immigration and Naturalization Service, 308 F. 2d 779	5, 6, 7
Roumeliotis v. Immigration and Naturalization Service, 304 F. 2d 453	3, 5, 6, 7

Regulations

Code of Federal Regulations, Title 8, Sec. 3.1(b)	2
Code of Federal Regulations, Title 8, Sec. 242.18	3
Code of Federal Regulations, Title 8, Sec. 242.20	3
Federal Regulations, Title 22, Sec. 9798	3
Federal Regulations, Title 23, Sec. 9117	3
Federal Regulations, Title 23, Sec. 9123	3

Statutes

Immigration and Nationality Act, Sec. 106(a)	2, 5
Immigration and Nationality Act, Sec. 106(a)(1)	2
Immigration and Nationality Act, Sec. 106(c)	2
75 Statutes at Large, p. 651	2
United States Code Annotated, Title 8, Sec. 1105a	2
United States Code Annotated, Title 28, Sec. 1254(1)	1

IN THE

Supreme Court of the United States

October Term, 1963

No. .....

SHAFFIQ KASSAB,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 24, 1963.

Citation to Opinion Below.

The opinion of the court of appeals [R. 21-25][1] is printed in Appendix B, *infra*. It is reported at 322 F.2d 824.

Jurisdiction.

The judgment of the court of appeals was entered on September 24, 1963 [R. 26]. It is printed in Appendix C, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1).

[1] "R." refers to the transcript of record in the Court of Appeals; "AR." refers to the separately page-numbered administrative record.

Questions Presented.

1. Under §106(a)(1) of the Immigration and Nationality Act, which provides that a petition for judicial review may be filed not later than six months after the date of a "final deportation order,"

(a) Is an alternative deportation order which does not specify an effective date or a country of destination a "final deportation order" so that a petition for review must be filed within six months after its date, or

(b) Does such an order become final when supplemented by a subsequent notice directing deportation on a date certain and to a named country, so that a petition for review may be filed within six months after the date of such notice?

2. Is judicial review of orders ancillary to a deportation order precluded by the doctrine of exhaustion of administrative remedies for failure to prosecute an administrative appeal

(a) Where the prior order did not specify an effective date or a country of destination, and

(b) Where the alien contends that his "consent" to "voluntary" deportation and consequent waiver of the right to appeal from the prior order procured by threat of wrongful deportation?

The Statutes and Regulations Involved.

The statutes and regulations involved are: §106, subsections (a) and (c), of the Immigration and Nationality Act (8 U. S. C. A. §1105a, 75 Stat. 651), and certain administrative regulations: 8 C. F. R. §§3.1(b),

242.18, and 242.20 (22 F. R. 9798, as amended by 23 F. R. 9123, and 23 F. R. 9117). The pertinent portions of the statutes and regulations are printed in Appendix A, *infra*.

Statement.

Petitioner is a native of Iraq, a citizen of Israel, and a resident of the United States.

On January 12, 1959, respondent approved an application by petitioner's wife (then occupying the status of an alien admitted to permanent residence in the United States) for the issuance of an immigrant visa to petitioner [R. 2]. Petitioner last entered the United States on or about June 1, 1959, under a visitor's permit; however, he contends that the approval of the application for issuance of an immigrant visa to him entitles him to remain in the United States (*Cf. Roumeliotis v. Immigration and Naturalization Service* (C. A. 7), 304 F. 2d 453, 455).

Petitioner took up residence in the United States with his wife and minor child, who is a native-born citizen of the United States. Respondent instituted proceedings to rescind the permanent resident status previously acquired by petitioner's wife, and respondent also instituted proceedings to deport petitioner, ostensibly for overstaying his visitor's permit, but actually (petitioner contends) in consequence of respondent's prior determination to proceed against petitioner's wife.

Petitioner appeared at a deportation hearing before respondent's special inquiry officer on February 7, 1961. Petitioner then signified his consent to "voluntary" departure in lieu of deportation and waived his right of

administrative appeal. He contends that he did so under threat of wrongful deportation. The special inquiry officer made an order "that in lieu of deportation [petitioner] be granted voluntary departure . . . within such time and under such conditions as the district director shall direct" and that failing such departure, petitioner should "be deported from the United States in the manner provided by law . . ." [AR. 3-5]. No date of departure or country of destination was then specified.

On December 18, 1961, respondent notified petitioner that if he failed to depart by August 1, 1962, or any authorized extension thereof his deportation to Israel had been directed [R. 7]. The time for petitioner's departure was extended by successive extensions, the latest of which expired March 3, 1963 [R. 2].

On May 3, 1963, petitioner filed in the court of appeals his petition for review of deportation order, directed to respondent's notice dated December 18, 1961, alleged to be a final deportation order effective March 3, 1963 [R. 1-8]. The petition was filed more than six months after the date of the order of February 7, 1961, but less than six months after the latest effective date and the latest notice by which such effective date was announced.

The petition for review was denied. The court of appeals held: (1) that the petition for review was untimely because it was filed more than six months after the order of February 7, 1961; and (2) that judicial review was precluded because of petitioner's failure to take an administrative appeal from the order of February 7, 1961.

Reasons for Granting the Writ.

1. The decision of the court of appeals in the instant case probably conflicts in principle with the recent decision of this Court in *Foti v. Immigration and Naturalization Service*, No. 28, this Term, decided December 16, 1963, reversing (C. A. 2), 308 F. 2d 779. (The text of this Court's opinion in the *Foti* case is not yet available to us at the time when the copy for this petition must go to the printer in order for the petition to be filed within the time required).

In the instant case, respondent cited the (now revised) *Foti* decision to the court of appeals in support of respondent's contention that the words "final deportation order" in §106(a) should be narrowly construed. In the *Foti* case the alien had applied to the Attorney General for suspension of a prior deportation order. The application was denied. The court of appeals for the Second Circuit held that denial of the application was not reviewable as a final deportation order. This Court reversed. Although this Court's opinion in the *Foti* case is not yet available to us, this Court must have approved an expanded rather than a narrow reading of the words "final deportation order" in §106(a).

2. The decision of the court of appeals in the instant case conflicts in principle with the decisions of the court of appeals for the Seventh Circuit in *Blagaic v. Flagg* (C. A. 7), 304 F. 2d 623 and *Roumeliotis v. Immigration and Naturalization Service* (C. A. 7), 304 F. 2d 453.

The *Blagaic* case, like the *Foti* case, involved review of a decision denying an application for stay of de-

portation. In the *Biagaic* case the court pointed out that the denial of the application for suspension was

> "ancillary to the [deportation] order. If the withholding of deportation is not granted, petitioner will be deported; thus, in a realistic sense the denial of a stay is part of the deportation order" (304 F. 2d 625).

In the *Roumeliotis* case, as here, deportation was ordered on the ground that the alien had overstayed his visitor's permit. He applied for a first preference immigrant visa, which was refused, and he sought judicial review of that decision. The court pointed out that if the application for immigrant visa "had been granted, it would have, in effect, nullified the deportation orders; therefore, the determination on the petition for the visa is in a realistic sense part of the deportation orders" and hence reviewable as such (304 F. 2d 455).

In the instant case, respondent's notice specifying the country of destination and the departure date was ancillary to the original deportation order, which did not supply either of those necessary elements. Accordingly, the notice should be judicially reviewable as were the orders in the *Biagaic*, *Roumeliotis*, and *Foti* cases.

3. The conflict of decisions referred to above concerns the question whether orders made subsequent to an initial deportation order may be reviewable as final deportation orders. In yet another respect the decision of the court of appeals in the instant case conflicts in principle with the Seventh Circuit decision in the *Roumeliotis* case, *supra*.

In the *Roumeliotis* case, as here, the alien had not prosecuted an administrative appeal from the prior de-

portation order, and the Government contended that judicial review of a subsequent order was precluded by reason of the alien's failure to exhaust his administrative remedies. In the instant case the court of appeals agreed with the Government's contention as an alternative ground of decision. But the decision in the *Roumeliotis* case is to the contrary. In reference to the Government's contention the court there said:

> "The difficulty with this argument is that while the review in the instant case relates to the orders of deportation, it concerns a proceeding that is ancillary to the orders; in other words, the petition for review is not a direct attack upon the orders per se" (304 F. 2d 455).

As this Court recognized when it granted the writ of certiorari in the *Foti* case, these questions are of public importance. The writ should therefore be granted in this case and the judgment of the court of appeals should be summarily reversed on the authority of the *Foti* decision, or else the cause should be set down for argument on the merits.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

MURRAY M. CHOTINER,
PATRICK J. HILLINGS,
By MURRAY M. CHOTINER,
Counsel for Petitioner.

APPENDIX A.

Statutes and Regulations Involved.

Immigration and Nationality Act (8 U. S. Code Sec. 1105a, 75 Stats. 651):

Sec. 106(a) (1): a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later . . .

Sec. 106(c): An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations . . . .

Regulations:

8 C. F. R. Sec. 242.18 (22 F. R. 9798): The order of the special inquiry officer shall be that the alien be deported, or that the proceedings be terminated, or that the alien's deportation be suspended, or that the alien be granted voluntary departure at his own expense in lieu of deportation, with or without examination, or any combination of these orders in the alternative or that such other action be taken in the proceedings as may be required for the appropriate disposition of the case.

8 C. F. R. Sec. 242.20 (22 F. R. 9798, as amended by 23 F. R. 9123): The order of the special inquiry officer shall be final except when the case has been certified as provided in Part 3 or Part 103 of this chapter, or an appeal is taken to the Board of Immigration Appeals, by the respondent or by the examining officer.

8 C. F. R. Sec. 3.1(b) (23 F. R. 2117): Appeals shall lie to the Board of Immigration Appeals from the following: . . .

(2) Decisions of special inquiry officers in deportation cases, as provided in Part 242 of this chapter.

APPENDIX B.

(Opinion).

United States Court of Appeals for the Ninth Circuit.

Shaffiq Kassab, *Petitioner*, vs. Immigration and Naturalization Service, *Respondent*. No. 18,650.

Sept. 24, 1963.

Petition to Review an Order of the Immigration and Naturalization Service.

Before: Barnes and Jertberg, Circuit Judges; and Stephens, Jr., District Judge.

Barnes, Circuit Judge:

This is an appeal from several orders of the Immigration and Naturalization Service requiring that petitioner either voluntarily depart from the United States or be involuntarily deported pursuant to a previous order of deportation.

Petitioner is an alien, a native of Iraq, and a citizen of Israel. He last entered the United States at New York, New York, on or about June 1, 1959, at which time he was admitted *as a nonimmigrant for pleasure* and was authorized to remain in the United States as a nonimmigrant until January 7, 1961.

On January 19, 1961, an Order to Show Cause and Notice of Hearing was issued by the Immigration and Naturalization Service, charging that petitioner was subject to deportation pursuant to the following provisions of law:

> "Section 241(a) (2) of the Immigration and Nationality Act [8 U.S.C. § 1251(a) (2)], in that, after admission as a non-immigrant under Section 101(a) (15) of said Act [8 U.S.C. § 1101(a) (15)] you have remained in the United States for a longer time than permitted."

Pursuant to the aforementioned Order to Show Cause, a deportation hearing was held at Los Angeles, California, on February 7, 1961. At this deportation hearing petitioner admitted the truth of the allegations in the Order to Show Cause, and admitted his deportability on the charge therein contained.

At this deportation hearing petitioner made an oral application that he be granted voluntary departure. Evidence was received with respect to this application, following which the special inquiry officer rendered an oral decision which included the following order:

> "ORDER: IT IS ORDERED that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government within such time and under such conditions as the district director shall direct.
>
> IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States in the manner provided by law on the charge contained in the Order to Show Cause."

Petitioner has not voluntarily departed. He is still in the United States.[1]

[1]By letter of June 15, 1961, the Immigration and Naturalization Service advised Petitioner that since a private bill was being considered by the Congress in his behalf, no steps would be taken to enforce his departure until August 1, 1962 (Ex. A-1). By letter of December 18, 1961, the Service informed petitioner that if did not depart by August 1, 1962, his deportation has

He has not appealed from that order, except by this proceeding.

Later in 1961, Congress saw fit to pass Public Law 87-301. Section 5(a) thereof became 8 U.S.C.A. § 1105a. It related to judicial review of orders of deportation and exclusion, and set up an exclusive procedure. It gave exclusive jurisdiction for any appeal from any order of deportation to the court of appeals of the circuit in which the administrative proceeding before the special inquiry officer took place.

It also provided that any petition for review was required to be filed "not later than six months from the date of the final deportation order, or from the effective date of this section, whichever is the later."

The final order deporting petitioner was dated February 7, 1961. While petitioner was notified "no steps would be taken to enforce his departure" on two occasions (see note 1, *supra*), such letters did not change the finality of the deportation order against him.

---

been directed to the country indicated in the attached Form . . ." (Israel. Ex. A-2 and A-3.) By letter of June 15, 1962, the Service informed petitioner that since a private bill in his behalf was being considered by the Congress, he would be permitted to remain in the United States until February 4, 1963, or 30 days following adverse action on the bill, whichever occurred sooner (Ex. A-4). His time was extended until March 3, 1963.

The Immigration and Naturalization Service notified petitioner by letter of March 25, 1963, that he was to be deported to Israel, and that he would be notified when arrangements for his departure had been completed. By a letter of April 3, 1963, petitioner was notified by the Service that arrangements had been made for his departure on April 9, 1963, and that he was to report to an Immigration Officer at a certain time and place on that date, prepared to depart. Petitioner apparently did not arrive at the appointed place and hour and thus did not depart.

The statute mentioned was passed by Congress on September 26, 1961, and became effective October 26, 1961. Six months later was April 26, 1962. No petition was filed until May 3, 1963. Very clearly we have no jurisdiction to consider petitioner's petition to review his own final order of deportation.

Not only has petitioner not come within the provisions of law as to time, he has failed to exhaust his administrative remedies. Section 1105a(c) of Title 8, United States Code, prohibits this court from considering his appeal from his own deportation order under such circumstance. *Cf. Siaba-Fernandez v. Rosenberg*, 9 Cir. 1962, 302 F.2d 139.

Petitioner seeks relief from the provisions of the statute by alleging that respondent's letter-notice to petitioner, dated December 18, 1961 was "in legal effect a final deportation order, effective March 3, 1963." That letter (Exhibit A attached to petition) merely gave petitioner a new date of departure. This court has already ruled such a notice of departure date is not a "final order of deportation." *Mai Kai Fong v. Imm. & Nat. Service*, 9 Cir. 1962, 305 F.2d 239. This court has consistently followed what might be called the narrow view of the statute; a view which remains the majority view of the various circuits, and corresponds more closely, in our opinion, to congressional intent. Such "letters" are "orders pursuant to 8 U.S.C. §1253, subsequent to entry of the final order of deportation." *Mai Kai Fong v. Imm. & Nat. Service, supra. Cf.*

also: *Murillo-Aguilera v. Imm. & Nat. Service*, 9 Cir. 1962, 313 F.2d 141; *Arreche-Barcelona v. Imm. & Nat. Service*, 9 Cir. 1962, 310 F.2d 690; *Holz v. Imm. & Nat. Service*, 9 Cir. 1962, 309 F.2d 452; *Giova v. Rosenberg*, 9 Cir. 1962, 308 F.2d 347.

Further, under Section 242(b) of the Immigration and Nationality Act, only special inquiry officers can issue orders of deportation. No special inquiry officer signed the December 18, 1961 letter. It was not an order of deportation.

Petitioner next seeks to avoid the effect of the lack of jurisdiction and his failure to exhaust his administrative remedies by urging that his consent to voluntary departure was not voluntarily given, but "coerced." We find no merit in this suggestion. Petitioner was represented by counsel of his own choice, and has not to this date denied the truth of the admissions he made to the charges filed against him, as a result of which he was ordered deported, as required by law.

Finally, petitioner seeks to avoid his own order of deportation because of his wife's "Petition by Permanent Resident Alien for Issuance of Immigrant Visa," filed December 12, 1958, by her on his behalf. Petitioner is incorrect in asserting he "was granted an immigration visa on petition of his wife." Her action gave him a preferred status under Section 203(a) (3) of the Immigration and Nationality Act, which might have aided him had he sought to obtain a visa to enter this country. Instead, he preferred, for reasons of his

own (as explained at his hearing when he sought voluntary departure), to apply for an immigrant visa, but not to follow through on such application, and to follow a different procedure for coming into this country, *i.e.*, as a visitor. He was admitted to the United States a second time as a *nonimmigrant visitor* for pleasure only. (R. 23-28.) He was deportable by reason of overstaying his leave as such nonimmigrant visitor;[2] that was the only charge placed against him, and his wife's difficulties[3] had nothing to do with *his* deportation; and cannot prevent it.

The order of deportation outstanding against petitioner is upheld for the reason hereinabove set forth. The petition is denied.

(Endorsed) Opinion Filed Sept. 24, 1963.

Frank H. Schmid, Clerk.

---

[2] *Mesina v. Rosenberg*, 9 Cir. 1940, 278 F. 2d 204.

[3] On March 13, 1962, the status of permanent residence granted the wife on November 12, 1958, was rescinded (8 U.S.C. § 1182(a)) and she was ordered deported (8 U.S.C. § 1251) after hearing, and appeal to the Board of Immigration Appeals.

APPENDIX C.

(Judgment).

United States Court of Appeals for the Ninth Circuit.

Shaffiq Kassab, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. 18050.

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition to review an order of the said Immigration and Naturalization Service in this Cause be, and hereby is denied, and the order of deportation is upheld.

Filed and entered: September 24, 1963

LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
FEB 7 1964
JOHN F. DAVIS, CLERK

No. 699

In the Supreme Court of the United States

October Term, 1963

SHAFIQ KAMAL, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. HANSELL, Jr.,
Assistant Attorney General,
[illegible],
[illegible],
Attorneys,
Department of Justice, Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes and regulations involved	2
Statement	3
Argument	7
Conclusion	14

CITATIONS

Cases:

Batista v. *Nicolls*, 213 F. 2d 20	13
Blagaic v. *Flagg*, 304 F. 2d 623	9
Falbo v. *United States*, 320 U.S. 549	13
Foti v. *Immigration and Naturalization Service*, 375 U.S. 217	9, 11
Lezos v. *Landon*, 235 F. 2d 581	8
Moi Kai Fong v. *Immigration and Naturalization Service*, 305 F. 2d 239	12
Masahiko Iwenge v. *Carr*, 89 F. 2d 447	13
Mesina v. *Rosenberg*, 278 F. 2d 291	13
Murillo-Aguilera v. *Immigration and Naturalization Service*, 313 F. 2d 141	12
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41	13
Philippides v. *Day*, 283 U.S. 48	13
Roumeliotis v. *Immigration and Naturalization Service*, 304 F. 2d 453, certiorari denied, 371 U.S. 921	9, 12
Sinba-Fernandez v. *Rosenberg*, 302 F. 2d 139	12
Tatsumi Masuda v. *Nagle*, 55 F. 2d 623	13
Tsiang Hsi-Tsing v. *Del Guercio*, 148 F. Supp. 803	8
United States v. *Sing Tuck*, 194 U.S. 161	12
Zupicich v. *Esperdy*, 319 F. 2d 773	10

Statutes and regulations:

	Page
Administrative Procedure Act, Sec. 10 (5 U.S.C. 1009)	8
Immigration and Nationality Act, 66 Stat. 163, as amended:	
Section 104(a) (8 U.S.C. 1104(a))	13
Section 106 (8 U.S.C., Supp. IV, 1105)	2, 7, 8, 9, 10, 12
Section 203(a) (8 U.S.C. 1153(a))	13
Section 221(a) (8 U.S.C. 1201(a))	13
Section 241(a) (8 U.S.C. 1251(a))	2, 4
8 C.F.R. 3.1(b)	12
8 C.F.R. 242.18	3
8 C.F.R. 242.20	3, 8
Miscellaneous:	
Gordon and Rosenfield, *Immigration Law and Procedure* (1963 loose-leaf ed.)	8, 14

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 699

SHAFFIQ KASSAB, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 322 F. 2d 824.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on September 24, 1963. The petition for a writ of certiorari was filed on December 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition for review of petitioner's deportation order was timely filed.

2. Whether petitioner exhausted his administrative remedies before asking for judicial review of his deportation order.

STATUTES AND REGULATIONS INVOLVED

Section 106 of the Immigration and Nationality Act, as added by Sec. 5(a) of the Act of September 26, 1961, 75 Stat. 651 (8 U.S.C. (Supp. IV) 1105a), provides pertinently:

> The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—
>
> (1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.
>
> * * * * *
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations * * *.

Section 241(a) of the Immigration and Nationality Act, 66 Stat. 204 (8 U.S.C. 1251(a)) provides pertinently:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States.

* * * * *

8 C.F.R. 242.18 provided as follows:

The order of the special inquiry officer shall be that the alien be deported, or that the proceedings be terminated, or that the alien's deportation be suspended, or that the alien be granted voluntary departure at his own expense in lieu of deportation, with or without preexamination, or any combination of these orders in the alternative or that such other action be taken in the proceedings as may be required for the appropriate disposition of the case.

8 C.F.R. 242.20 provided as follows:

The order of the special inquiry officer shall be final except when the case has been certified as provided in § 6.1(c) or § 7.1(b) of this chapter, or an appeal is taken the Board of Immigration Appeals by the respondent or by the examining officer.

STATEMENT

Petitioner, a native of Iraq and a citizen of Israel, while visiting members of his family in the United States, married an alien from his native country in November, 1958 (R. 3, 8, 11, 17, 20, 23). He returned to Israel immediately thereafter and applied for an immigrant's visa. A few months later, he received a letter from his lawyer in Los Angeles asking him to return in connection with his case and a telegram

advising that his father was very ill. He applied for and received a visitor's visa from the American consul at Amsterdam authorizing him to enter and remain in the United States until January 7, 1961. On or about June 1, 1959, he entered this country (R. 11-12, 8, 23). On September 29, 1960, petitioner applied for classification as a permanent resident alien. This was denied on October 31, 1960, on the ground that no visa was available for petitioner (R. 18, 40). On December 8, 1960, petitioner received a letter from the Immigration and Naturalization Service informing him that his application for extension of time to depart from the United States had been denied and instructing him to depart the United States by January 7, 1961. Petitioner sought reconsideration of his application. He submitted the letter of a physician caring for his wife, stating that she was in danger of a miscarriage arising from an accident and needed the presence of her husband, and a letter from his attorney stating that petitioner had an action for damages arising from an accident which had occurred on October 11, 1958, which was scheduled for trial on January 30, 1961 (R. 24-27).

On January 19, 1961, an order to show cause was issued giving notice of hearing as to why petitioner should not be deported under Section 241(a)(2) of the Immigration and Nationality Act in that, as a visitor, he had remained in the United States for a longer time than was permitted (R. 23). At the hearing on February 7, 1961, before a special inquiry officer at Los Angeles, petitioner appeared with retained counsel, admitted his deportability, and re-

quested that, if deportation were ordered, he be sent to Israel (R. 8–9). Petitioner requested the privilege of voluntary departure at his own expense at any time prior to October 1, 1961. When the special inquiry officer stated that he did not have authority to fix the departure date, petitioner's counsel expressed willingness to amend the application so as not to specify the date (R. 9–10). The testimony of petitioner was then heard as to the circumstances of his presence in this country and his reasons for wishing a delay in his departure date (R. 10–21). Petitioner was asked (R. 17):

> Q. Now, regarding voluntary departure from the United States, how soon could you leave?
>
> A. As soon as possible.
>
> Q. Well now, what do you call possible. Would you be able to leave within a week?
>
> A. As soon as the director will direct me to leave.
>
> Q. In other words, if you are granted voluntary departure you will leave the United States in whatever time is fixed for you by the District Director of this Service?
>
> A. Yes.

The government stated that it was not opposed to the granting of voluntary departure but was not convinced that petitioner would truly leave with reasonable promptness; accordingly, it asked that the special inquiry officer give his decision (R. 21). Recounting the circumstances impelling petitioner's desire for delay and his expressed willingness to depart when ordered to do so, the officer ordered that the privilege of voluntary departure be granted within such time

as should be specified by the district director, but that if petitioner should fail to comply therewith, he should be deported without further hearing (R. 3–5). Petitioner acknowledged that he understood the decision and his counsel stated that no appeal would be taken. The special inquiry officer announced that the decision thus became final (R. 22).

By letter of June 15, 1961, the Immigration and Naturalization Service advised petitioner that since a private bill on his behalf was under consideration in Congress, no steps would be taken to enforce his departure until August 1, 1962 (Ex. A–1; Pet. App. 3). By letter of December 18, 1961, signed by the assistant district director, the Immigration Service informed petitioner that if he did not depart by August 1, 1962, his "deportation has been directed to the country indicated in the attached Form * * * [Israel]" (Ex. A–2 and Ex. A–3; R. 35; Pet. App. 3–4). By letter of June 15, 1962, the Service notified petitioner that he would be permitted to remain in the United States until February 1, 1963, or until thirty days after adverse action on the pending private bill, whichever occurred sooner (Ex. A–4; Pet. App. 4). Later, the time was extended until March 3, 1963. On May 3, 1963, a petition for review was filed with the Court of Appeals for the Ninth Circuit alleging that petitioner's consent to voluntary departure was procured under threat of deportation; that petitioner had been granted an immigration visa on the petition of his wife, who had been lawfully admitted to the United States for permanent residence; that a child had been born to them after petitioner took up permanent resi-

dence with his wife; that proceedings were in progress to deport his wife and that it was for this reason that petitioner was threatened with deportation. It was also alleged that the petition for review was timely because on December 18, 1961, petitioner was notified by the assistant district director that if he failed to depart by August 1, 1962, or any authorized extension thereof, his deportation to Israel had been directed; that such departure was successively extended to March 3, 1963; and that the notice to petitioner dated December 18, 1961, was in legal effect a final deportation order effective March 3, 1963, and reviewable as such (R. 29–34, 35).

The court of appeals denied the petition for review, on the grounds that it had not been seasonably filed and that petitioner had failed to exhaust his administrative remedies by appealing from the decision of the special inquiry officer (Pet. App. 2–7).

ARGUMENT

1. The court of appeals held that the petition for review was untimely in that it was filed (a) more than six months after the special inquiry officer's deportation order of February 7, 1961, and (b) more than six months after October 26, 1961, the date on which § 106(a) of the Immigration and Nationality Act became effective. Petitioner argues that the February 7, 1961, order was not a "final deportation order" within the meaning of § 106(a)(1), and therefore did not set in motion the statutory six-month period, since it did not specify the time of deportation or the destination country. He maintains that the

final and reviewable deportation order was the assistant district director's letter of December 18, 1961, which became effective, after extensions, on March 3, 1963. There is no substance to petitioner's contentions.

Under the current administrative procedure, established by the amended regulations of January 22, 1962, the special inquiry officer designates the country of deportation in the final order which culminates the deportation proceeding itself. At the time this case arose, however, the selection of the place of deportation was customarily postponed until after the termination of the deportation hearings, and was made by an official other than the special inquiry officer. Gordon and Rosenfield, *Immigration Law and Procedure* (1963 loose-leaf ed.) pp. 552.3, 601, 873. No one doubted, however, that the special inquiry officer's decision was a final order as to all issues covered by it. The regulations expressly so provided (8 C.F.R. 242.20), and, prior to the enactment of § 106(a) in September 1961, such orders were regularly reviewable in the district courts under § 10 of the Administrative Procedure Act (5 U.S.C. 1009). Gordon and Rosenfield, *op. cit. supra*, p. 873.

Prior to the 1961 amendments, an ancillary order fixing the place of deportation was separately reviewable in the district court as a "final agency action" under § 10(c) of the Administrative Procedure Act. *Ibid.* Cf. *Lezos* v. *Landon*, 235 F. 2d 581 (C.A. 9); *Tsiang Hsi Tseng* v. *Del Guercio*, 148 F. Supp. 803 (S.D. Cal.). Such an order, however, is not a "final order of deportation" within the meaning of § 106(a).

Any doubt on that score that may have been created by *Rogmeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921, and *Blagaic* v. *Flagg*, 304 F. 2d 623 (C.A. 7), was laid to rest by this Court in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217. The holding in that case was that not only the determination of deportability, but all determinations made by the special inquiry officer as an integral part of the deportation hearing and reflected in his final deportation order, are reviewable in the courts of appeals under § 106(a). The Court further stated, however, that ancillary determinations made by other officers subsequent to the deportation hearing are not covered by that provision. Thus, the Court declared (375 U.S. at 230, fn. 16):

> When § 106(a) was enacted, the withholding of deportation under § 243(h) was a matter determined by an official other than the special inquiry officer conduc[t]ing the deportation hearing, on a later occasion, under regulations promulgated by the Attorney General, *and the designation of the country of deportation was not made until after the issuance of the warrant of deportation. Under revised and currently effective regulations, both the designation of the country of deportation and the decision on any § 243(h) request for relief which the alien might wish to make are effected in the deportation proceedings and reflected in the final order of deportation. While presumably denials of § 243(h) relief were not covered by § 106(a) at the time of its enactment*, it does not seem incongruous to assume that such

> orders, because of the change in administrative regulations making such decisions an integral part of the deportation proceedings conducted by a special inquiry officer, are now within the reach of § 106(a)'s judicial review provisions. Such a result simply means that, while the jurisdiction of the Courts of Appeals is limited now, as when § 106(a) was enacted, to the review of "all final orders of deportation," a change in the administrative regulations relating to the processing and determination of applications for § 243(h) relief had the incidental effect of expanding the decisional content of such orders. Clearly, changes in administrative procedures may affect the scope and content of various types of agency orders, and thusly the subject matter embraced in a judicial proceeding to review such orders. [Emphasis added.]

This is not to say, of course, that an ancillary order, issued under the old procedure, designating the country of deportation is not subject to judicial review at all. Such an order may be challenged in the district court under the Administrative Procedure Act, just as it could be prior to the enactment of § 106(a). Cf. *Zupicich* v. *Esperdy*, 319 F. 2d 773 (C.A. 2), pending on certiorari in No. 669 Misc., this Term. But since Israel was the country which petitioner himself requested, it is clear that on the facts of this case, there is no basis for challenging the district director's designation of that country in the December 18, 1961 order.

2. The foregoing considerations dispose of the contention that the district director's notice of December 18, 1961, was a "final deportation order" or was essen-

tial to the finality of the special inquiry officer's order. There remains the possible contention—not squarely raised by petitioner or passed upon by the court of appeals (although implicit, perhaps, in the Questions Presented (Pet. 2))—that the final order entered on February 7, 1961, did not become effective until March 3, 1963, because (a) by its own terms it was to take effect only after "respondent fails to depart [voluntarily] when and as required" (R. 2–3), and (b) there is no indication in the record that, prior to March 3, 1963, petitioner disobeyed the terms of an explicit departure order.[1] We believe that such an argument is untenable—*i.e.*, that the adjudication of deportability became final and reviewable in February 1961, even though its operative effect and ministerial execution remained contingent. *Foti* v. *Immigration Service*, *supra*, 375 U.S. at 219, fn. 1. However, it is unnecessary to reach that question here. For even if the petition for review were timely on the theory just suggested, the Ninth Circuit's disclaimer of jurisdiction was still plainly correct on the independent ground that petitioner failed to exhaust his administrative remedies.

Under the regulations, the decision of a special inquiry officer in a deportation case may be appealed with-

[1] On June 15, 1961, the Service advised petitioner that, since Congress was considering a private bill in his behalf, no steps would be taken to enforce his departure until August 1, 1962 (Ex. A–1; Pet. App. 3). The notice of December 18, 1961 reiterated that petitioner would be deported if he did not leave voluntarily by August 1, 1962. Successive notices extended the time to March 3, 1963.

in ten days to the Board of Immigration Appeals (8 C.F.R. § 3.1(b)(2)). At no time did petitioner exercise his right of appeal. Accordingly, since Section 106(c) of the Immigration and Nationality Act, adopted in September 1961, forbids the courts of appeals to review any order of deportation "if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations," the court below plainly lacked jurisdiction of this cause. See *Siaba-Fernandez* v. *Rosenberg*, 302 F. 2d 139 (C.A. 9); *Mai Kai Fong* v. *Immigration and Naturalization Service*, 305 F. 2d 239, 242 (C.A. 9); *Murillo-Aguilera* v. *Immigration and Naturalization Service*, 313 F. 2d 141 (C.A. 9).[2] Indeed, this jurisdictional infirmity would have been present even if the doctrine of exhaustion had not been written into the statute. As a rule fashioned by the courts to avoid unnecessary interruption of the administrative process and superfluous judicial review, it had been applied to immigration matters even before the 1961 amendments. *United States* v.

[2] *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921, cited by petitioner, is distinguishable. There the court held that petitioner's failure to take an administrative appeal from the district director's refusal to grant him a first-perference visa—a discretionary order which the court held to be ancillary to the deportation orders issued against petitioner by the special inquiry officer—did not preclude judicial review under Section 106(a). The basis for that decision, however was that the petition for review was not a direct attack upon the deportation orders *per se*, but related exclusively to an ancillary matter. If, as in the present case, the petitioner had been challenging the determination of deportability itself, the Seventh Circuit would undoubtedly have reached a different result.

Sing Tuck, 194 U.S. 161; *Batista* v. *Nicolls*, 213 F. 2d 20 (C.A. 1). Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Falbo* v. *United States*, 320 U.S. 549.

This case presents no circumstances which would warrant relaxation of the rule of exhaustion. There is not the slightest doubt as to petitioner's deportability. It is conceded that he last entered the United States in June 1959 under a visitor's visa authorizing him to remain until January 7, 1961, and that he overstayed his appointed time. A nonimmigrant who remains in the United States longer than he has been authorized is subject to deportation (*Philippides* v. *Day*, 283 U.S. 48 (1931); *Mesina* v. *Rosenberg*, 278 F. 2d 291 (C.A. 9); *Masahiko Inouye* v. *Carr*, 89 F. 2d 447 (C.A. 9); *Tatsumi Masuda* v. *Nagle*, 55 F. 2d 623 (C.A. 9)). Indeed, at the hearing before the special inquiry officer, petitioner expressly admitted that he was deportable. The only question at issue was whether he should be accorded the privilege of voluntary departure, and on that question he prevailed.

Petitioner now maintains that, even though he last entered the country on a visitor's visa, he is entitled to remain, since the district director of the Service had earlier approved an application for an immigrant visa filed on petitioner's behalf by his wife (Pet. 3). But the approval of such an application merely constitutes a finding that the would-be immigrant is qualified for preferred status under § 203(a)(3) of the Immigration and Nationality Act; the determination of general admissibility must still be made by a consular officer, who alone has authority to issue a visa. §§ 104(a) and 221(a) of the Immigration and Nation-

ality Act; Gordon and Rosenfield, *Immigration Law and Procedure*, pp. 320–321, 329–330. Petitioner testified at the deportation hearing that he had applied "around December 1958" to the American Consul in Israel for an immigrant visa, but had not been granted one (R. 11–12).

Finally, the allegation that the Immigration Service was seeking to deport petitioner "ostensibly for overstaying his visitor's permit, but actually" because the Service had already taken steps to rescind his wife's permanent resident status (Pet. 3) is completely without foundation either in the record or outside of it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

FEBRUARY 1964.